Supreme Court, U.S.
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No. 87-226

In The

Supreme Court of the United States

October Term, 1987

IRVIN M. BEAUFORD,

Petitioner,

-vs-

SISTERS OF MERCY, PROVINCE OF DETROIT, INC., and CLARK BOWMAN, SR., Jointly & Severally,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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September 3, 1987

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE 6TH CIRCUIT COURT OF APPEALS HAS ENTERED AN OPINION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL AND OF THIS COURT WITH REGARD TO THE BURDEN OF PROOF IN AN EMPLOYMENT DISCRIMINATION MATTER?

PETITIONER SAYS	YES
COURT OF APPEALS AND RESPONDENTS SAY	NO

II. WHETHER THE COURT OF APPEALS HAS WRONGLY APPLIED THE STANDARDS FOR PUNITIVE DAMAGES UNDER THIS COURT'S OPINION AND OPINIONS OF OTHER COURTS OF APPEALS?

PETITIONER SAYS	YES
COURT OF APPEALS AND RESPONDENTS SAY	NO

III. WHETHER THE COURT OF APPEALS HAS VIOLATED THIS COURT'S OPINIONS AND THE OPINIONS OF OTHER COURTS WITH REGARD TO THE RIGHT TO A TRIAL BY JURY?

PETITIONER SAYS	YES
COURT OF APPEALS AND RESPONDENTS SAY	NO

IV. WHETHER THE COURT OF APPEALS' HOLDING THAT PETITIONER WAIVED HIS PROCEDURAL OBJECTION TO RESPONDENTS' MOTION FOR JNOV WAS IN CONFLICT WITH OPINIONS OF THIS COURT OR OF OTHER COURTS OF APPEAL?

PETITIONER SAYS	YES
COURT OF APPEALS AND RESPONDENTS SAY	NO

Disclosure of Corporate Affiliations

Pursuant to Supreme Court Rule 28.1, Respondent Sisters of Mercy, Province of Detroit, Inc., makes the following disclosures:

Respondent, Sisters of Mercy, Province of Detroit, Inc., is a non-profit Michigan corporation, and has no parent, subsidiaries or affiliates. It is not publicly owned and no publicly owned corporation has a financial interest in the outcome of this litigation.

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CONCISE STATEMENT OF THE CASE

Irwin Beauford was first employed by the Sisters of Mercy—Province of Detroit, Inc., as a boiler operator. (Beauford, Tr. Vol. I, p. 124). Clark Bowman Sr. was employed as the Director of the Physical Plant (Bowman Sr., Tr. Vol. IV, pp. 18-19).

In November 1982, Beauford was injured while working on the midnight shift (R-1, Complaint ¶ 9). Beauford stated that he saw Clark Bowman, Jr., son of Bowman Sr., looking at him through a window in the boiler room (Beauford, Tr. Vol. I, p. 153). Beauford ran over towards the window, but he tripped in an open gutter, injuring his back (*Id.*, p. 154). Bowman Jr. told Beauford he was working for Tom Parker, head of security for the Sisters and that he was just checking the campus (*Id.*, p. 155). Although Beauford made a written report of this incident to defendants (Pl. Ex. I), he did not report it to them as a racial incident, either in writing or orally (Beauford, Tr. Vol. I, pp. 231-232). Beauford never complained to either defendant that this incident involved racial discrimination (*Id.*, pp. 182, 231-232). Beauford applied for, and received, six months of workers' compensation for his back injury (*Id.*, pp. 208-209).

Beauford did not return to work until May 1983, when he was told to report for work on the day shift on May 9 (Horton, Tr. Vol. III, pp. 121-122). His supervisor was concerned that Beauford would be alone on the midnight shift and might reinjure himself *(Id.)*. Prior to November 5, 1982, Beauford worked on the day shift for the City of Detroit. However, Beauford was not working a day shift

for the City of Detroit in May 1983. Indeed, he has not worked any shift for the City since November 5, 1982 (Beauford, Tr. Vol. I, pp. 214 and 217-218).

On May 9, Beauford returned to work on the day shift, as requested (*Id.*, p. 217). He worked that day, but never returned to work for the Sisters of Mercy thereafter (*Id.*). Beauford alleges that he is disabled and that he has not worked for anybody since November 1982 except for the single shift in May 1983 (*Id.*, p. 218).

In September 1982, Bowman Sr. reorganized the Plant Department and had Marvin Horton, already the maintenance supervisor, as an additional duty, take over supervision of the boiler room (Bowman Sr., Tr. Vol. IV, p. 20). Plaintiff and two white men with more seniority than plaintiff were passed over for that job.

PROCEEDINGS BELOW

Beauford sued respondents in October 1983 alleging that his back injury, his assignment to the day shift, and his failure to be made boiler room supervisor were acts of intentional racial discrimination in violation of 42 U.S.C. 1981. Prior to trial, Beauford waived all claim to actual damages and sought only punitive damages. The jury returned a verdict in favor of Beauford for $2 in nominal damages and $300,000 in punitive damages ($150,000 against each defendant).

The U.S. District Court for the Eastern District of Michigan, by Judge Ralph Freeman, granted respondents'

motions for JNOV and new trial and entered a judgment in favor of respondents. On appeal, the U.S. Court of Appeals for the Sixth Circuit held that, although the District Court was correct in holding that there was no evidence to support a verdict on the window incident or the change to day shift, or any award of punitive damages, a jury could have found that plaintiff was not promoted to boiler room supervisor because of his race. Therefore, the Court of Appeals reinstated the verdict of $2 in nominal damages but not the punitive damages. Petitioner applied for rehearing en banc which the Sixth Circuit denied on June 29, 1987.

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SUMMARY OF ARGUMENT

Question I

Petitioner has misread the standards for the burden of proof in a discrimination case. There is no conflict between this opinion by the Sixth Circuit and any opinion of any other circuit.

Question II

Petitioner offered no evidence to support a claim for punitive damages, and the claim was properly denied.

Question III

It is well settled that a court can grant a judgment notwithstanding the verdict without violating a party's constitutional right to a jury trial, so long as there was insufficient evidence presented to sustain a jury verdict.

Such was the case here, and the JNOV was properly granted.

Question IV

The motion for JNOV was preceded by a proper motion for directed verdict. In addition, petitioner waived any objection on this point by failing to object at the trial court level.

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ARGUMENT

Question I

Petitioner asserts first that, as to the incident in which he fell into a gutter,* the Sixth Circuit wrongfully placed the burden of proof on plaintiff, an allocation which plaintiff alleges conflicts with that made in other circuits. That assertion seriously misstates the holding of the Sixth Circuit. In fact, the Sixth Circuit correctly allocated the burden of proof in accord with the controlling decision of the Supreme Court, *Texas Department of Community Affairs v Burdine,* 450 U.S. 248 (1981).

In *Burdine,* the Supreme Court emphasized that:

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.

The District Court, in granting respondents' motion for JNOV, held that there was no evidence that the gutter

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*Throughout his petition, petitioner bases his argument for review *solely* on that incident.

incident was related to race and that, to the contrary, the uncontradicted evidence supported the nondiscriminatory, legitimate reason advanced by respondents: that Bowman Jr. was assigned to patrol the campus to look for vandals and that his patrol had no racial purpose or animus.* The Sixth Circuit concurred with that holding:

> "The plaintiff produced no evidence whatsoever that he was treated differently from white employees or singled out for surveillance or any other form of 'spying', nor did he indicate at the time that he complained of the incident that he believed it to be racially motivated. Moreover, the defendants' articulated legitimate, nondiscriminatory reason for the impromptu patrol as designed to curb vandalism remained unrebutted at the conclusion of all of the evidence. . . . Finally, the plaintiff's evidence of isolated racial incidents or epithets or purported disparate treatment of certain other black employees was wholly unsupported by facts and was not connected with any asserted conduct regarding the plaintiff." *Beauford v. Sisters of Mercy—Province of Detroit, Inc.*, 816 F.2d 1104, 1108 (6th Cir. 1987).

Petitioner claims that that decision conflicts with *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986). However, both the Sixth and Seventh Circuits based their decisions on the same standard. The difference in the result arose from the existence of both direct and circumstantial evidence of discrimination in *Yarbrough* and the absence of such evidence in the present case.

In the present case, the Sixth Circuit correctly looked not just at whether Beauford had presented a prima facie

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*R-29, Memorandum Opinion, pp. 8-10.

case but at whether he had met his burden of proving intentional discrimination. The Sixth Circuit concluded that Beauford had not only failed initially to show any connection between that incident and race, he had also failed totally to rebut the legitimate, nondiscriminatory reason advanced by respondents. Therefore, the Sixth Circuit, like the District Court, was compelled to hold that plaintiff had failed, as a matter of law, to present evidence sufficient to go to a jury on that claim.

In *Yarbrough,* to the contrary, plaintiff not only showed racial animus directed at him by his supervisor, he also presented direct and circumstantial evidence to contradict the reason stated by defendant for his firing. Therefore, the Seventh Circuit, although admitting it was "a close question," 789 F.2d at 513, deferred to the decision of the jury and of the District Court because "this case is a swearing contest." *Id.* at 514. The Seventh Circuit noted that:

> "It is apparent that the jury found Yarbrough's account of the facts credible and, discredited the defendants'. *On the record before us,* we cannot say that the jury was unreasonable in doing so, *or that their conclusion was not supported by substantial evidence.*" *Id.,* emphasis added.

Thus, the difference between the results in the present case and in *Yarbrough* lies not in the standard applied but in the facts in the record.* Therefore, *Yarbrough* does

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*Plaintiff also appears to contend that his mere allegations of discrimination shift the ultimate burden to defendants to prove they have not engaged in discriminatory conduct. That argument is directly contrary to *Celotex Corp. v Catrett,* — U.S. —, 106 S. Ct. 2548 (1986), and *Anderson v Liberty Lobby,* — U.S. —, 106 S. Ct. 2505 (1986).

not conflict with the decision of the Sixth Circuit in the present case, and Beauford's petition should be denied.

Question II

Petitioner asserts that the Sixth Circuit erred in upholding the District Court's disallowance of punitive damages. However, petitioner does not dispute the standard applied by the Sixth Circuit. Instead, he argues that had the Sixth Circuit held that there was sufficient evidence to support a jury finding that the window incident constituted racial discrimination, then the Sixth Circuit could have allowed the punitive damages. However, as discussed above, the Sixth Circuit was correct that the incident was not racially motivated.

Moreover, the Sixth Circuit correctly held that:

> "[N]o testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character on the part of either defendant as to support a jury verdict imposing punitive damages. Accordingly, the defendants were properly entitled to judgment NOV on the plaintiff's claim for punitive damages." *Beauford v. Sisters of Mercy—Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987).

Because of that failure of proof by Beauford, the Sixth Circuit, like the District Court, was required to hold, as a matter of law, that petitioner was not entitled to punitive damages.

Nevertheless, Beauford argues that merely establishing a prima facie case entitles him to punitive damages, citing for support *Block v. R. H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983). However, that opinion merely holds that

the jury could reasonably infer recklessness from the facts in that case. *Id.* at 1247. Both the Eighth Circuit in *Block* and the Sixth Circuit in the present case applied the standard for punitive damages set out in *Smith v. Wade,* 461 U.S. 30, 56 (1983), to the facts in the case before them. Any difference in result is because of those facts and not because of any conflict in the law. Therefore, Beauford's petition should be denied.

Question III

Petitioner claims that in upholding the District Court's granting of JNOV, the Court of Appeals violated his right to trial by jury. That question merits little discussion.

It is well settled that, pursuant to Federal Rule of Civil Procedure 50(b), the court may grant a judgment notwithstanding the verdict if, as in the present case, the nonmovant has not offered sufficient evidence to warrant a jury verdict in his favor. *Neely v Martin K. Eby Construction Co.,* 386 U.S. 317, 321 (1967); *Baltimore and Carolina Line v Redman,* 295 U.S. 654 (1935). Therefore, petitioner's argument is without foundation and his petition should be denied.

Question IV

Petitioner asserts that the respondents' failure to make a timely motion for a directed verdict at the close of all evidence barred their motion for JNOV. However, the Sixth Circuit correctly rejected that argument because

petitioner raised it for the first time on appeal.* *Beauford v Sisters of Mercy—Province of Detroit, Inc.*, 816 F.2d 1104, 1108 n. 3 (6th Cir. 1987):

> "The plaintiff's assignment of error charging that the defendants failed at the conclusion of all the evidence to renew their motion for a directed verdict, which the district court had earlier taken under advisement, was not presented to the district court despite ample opportunity to do so in the post-trial proceedings. A court does not view favorably the raising of such an issue for the first time on appeal. *See Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294-95 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983); *Bannert v. American Can Co.*, 525 F.2d 104, 111 (6th Cir. 1975), *cert. denied*, 426 U.S. 942, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976); *Moran v. Raymond Corp.*, 484 F.2d 1008, 1011-14 (7th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed.2d 490 (1974). Accordingly, the plaintiff's objection in this respect was waived in light of the proceedings in the court below."

That holding that petitioner waived his objection is not contrary to any decision cited by petitioner. To the contrary, that decision is supported by decisions of the Su-

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*At the close of petitioner's case in chief, respondents moved for directed verdict on the ground that plaintiff had failed to present adequate proof of intentional discrimination or of the evil motive or intent required for an award of punitive damages. The District Court took that motion under advisement and requested that respondents proceed with their proofs. The District Court did not rule on that motion until it issued the Memorandum Opinion granting JNOV. Respondents did not "renew" their motion for directed verdict at the close of all of the evidence because their motion was still pending. Petitioner did not raise any procedural objection in the District Court to respondents' "Motion for Directed Verdict, for Judgment Notwithstanding the Verdict, for New Trial, or for Remittitur."

preme Court. *E.g., Singleton v. Wulff,* 428 U.S. 106, 121 (1976). Therefore, Beauford's petition should be denied.

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CONCLUSION

Because of the foregoing reasons, the questions raised by petitioner are not within the scope of questions for which certiorari is allowed under Supreme Court Rule 17. Therefore, Beauford's petition for certiorari should be denied.

Respectfully submitted,

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